**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| Joint Application by SBC Communications, Inc., | ) | |
| Southwestern Bell Telephone Company, and | ) | CC Docket No. 01-194 |
| Southwestern Bell Communications Services, Inc. | ) | |
| d/b/a Southwestern Bell Long Distance for | ) | |
| Provision of In-Region, InterLATA Services in | ) | |
| Arkansas and Missouri | ) | |

# COMMENTS OF EL PASO NETWORKS, LLC AND PACWEST TELECOM, INC.


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## SUMMARY

The competitive checklist is becoming increasingly disconnected from the circumstances of current competition in a particular state. The Commission has allowed applicants to rely, on a limited basis, on its performance in other states to meet checklist requirements. SBC Communications, Inc. ("SBC"), in its recent application for Section 271 authority in Arkansas and Missouri, is taking this approach to the extreme. SBC's application incorporates rates, terms and conditions, and in some cases, even performance data, from other states to demonstrate compliance with the checklist. Thus, evaluating SBC's application does not necessarily provide a definitive insight into its performance and the actual state of competition in Arkansas or Missouri.

The Commenters emphasize how such an approach can displace attention from the state of actual competition in a particular state, and whether such competition is viable. For instance, as recently as early this year, both the Arkansas and Missouri Public Service Commissions had significant reservations about the state of local competition in their respective states. In fact, both commissions were poised to reject SBC's applications. SBC's solution was to proffer a mega-interconnection agreement, the M2A and A2A, that relied heavily on rates, terms and conditions from states in which it had garnered Section 271 approval. The proffer was conditional, however, as the terms of the mega-interconnection agreements are only available upon Section 271 approval. Both state commissions were willing to rely on this promise of future competition to allay their respective concerns regarding the state of actual competition.

As commenters have pointed out in both state proceedings evaluating SBC's application, and the first FCC proceeding evaluating SBC's Missouri application, viable local competition has not developed in either state, and the prospects for future competition in Arkansas and

Missouri are equally dim. SBC is asking this Commission to make the same leap of faith that the Arkansas and Missouri commissions did, *i.e.,* that if the application is approved competition will develop.

Even if the Commission determines that these promises of future performance are sufficient to determine checklist compliance, which it should not, there is an independent statutory obstacle to the granting of SBC's applications. The public interest standard, both as defined in the Act and supporting legislative history, and as articulated by the Commission, requires that the applicant demonstrate that there is actual competition in a particular state and that such competition is irreversible. This standard is required to be independent of considerations of checklist compliance and examines whether competition has actually taken root in a particular state. As the Commenters will show, SBC's application is not in the public interest. The Commission needs to reestablish a strong public interest standard to ensure that applications are supported by evidence of strong, viable, and irreversible competition in a particular state.

In addition, the Commenters will demonstrate that SBC has failed to meet checklist requirements in regard to pricing, OSS, and resale of advanced services. In Missouri, the same pricing factors that led to the withdrawal of SBC's first application are still in place. Until these factors are addressed, there is no basis to find compliance with checklist item 2. In Arkansas, CLECs have not been able to obtain cost-based rates since the implementation of the 1996 Act. Competition in both Arkansas and Missouri has suffered due to the high, non-cost based rates CLECs must pay.

There are also significant issues still remaining in regard to SBC's OSS in both states. The poor flow-through of SBC's OSS has not improved and continues to mire CLEC orders in

time and resource-consuming manual processing. In addition, SBC's admission of problems in its LMOS database clearly places in doubt the validity of its maintenance and repair OSS data. Thus, SBC still is not able to demonstrate compliance with checklist item 2 in regard to OSS.

Finally, SBC continues to try and evade its obligations in regard to the resale of advanced services. SBC plays definitional games in an effort to avoid its clear resale obligations. The Commission should require SBC to meets its obligations in to checklist item 14 before approving its application.

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**COMMENTS OF EL PASO NETWORKS, LLC AND PACWEST TELECOM, INC.**

El Paso Networks, LLC ("El Paso") and PacWest Telecom, Inc. ("PacWest") ("Commenters") submit these comments concerning the above-captioned Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance ("SBC") for Provision of In-Region, InterLATA Services in Arkansas and Missouri filed August 20, 2001 ("Application").[1] For the reasons stated herein, the Federal Communications Commission ("Commission") should deny the Application.[2]

[1] Comments Requested on the Joint Application By SBC Communications, Inc. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the States of Arkansas and Missouri, Public Notice, CC Docket No. 01-194, DA 01-1952, released August 20, 2001.

[2] Commenters request that the Commission incorporate into to this docket in their entirety the following: CC Docket No. 01-88, Comments of El Paso Networks, LLC and PacWest Telecom, Inc. (April 24, 2001) ("*El Paso/PacWest Comments*") and CC Docket No. 01-88, Reply Comments of PacWest Telecom, Inc. (May 16, 2001) ("*PacWest Reply Comments*").

## I. THE COMMISSION NEEDS TO REESTABLISH THE PUBLIC INTEREST STANDARD AS A SEPARATE AND VIABLE STANDARD

### A. The Competitive Checklist Is No Longer An Adequate Barometer of The State of Competition In A Particular State

The Commenters are concerned about a disturbing trend in regard to Section 271 applications. An applicant that is not close to meeting checklist requirements in a particular state will, at the last minute, propose a mega-interconnection agreement that tracks the bare minimum in terms and conditions that this Commission has determined will meet technical compliance with the competitive checklist requirements. The applicant will then populate this agreement with high, non-cost based rates, and then gauge the reaction to these rates. The applicant will then implement, once again at the last minute, voluntary price reductions that will bring these rates within a perceived "zone of reasonableness." The applicant will then support its application with performance data, and attempt to fill any gaps in data with data incorporated from other states. Thus, in some cases, an applicant can allege to be in compliance with the checklist requirements without establishing the development of local competition in the particular state in question.[3] The Commenters term this approach "application by incorporation and reference."

Applicants can do this because the competitive checklist has become increasingly disconnected from the circumstances in a particular state. The Commission has allowed

[3] When Commenters speak of "technical compliance" with the checklist in these Comments, the Commenters are not suggesting that SBC is in compliance with the checklist in either Arkansas and Missouri. Commenters are merely referring to the findings of the Arkansas and Missouri state commissions that SBC is in compliance with the checklist despite failing to demonstrate the advent of meaningful competition in either state.

applicants to incorporate interconnection terms and conditions,[4] rates,[5] and even performance data[6] from another state to demonstrate checklist compliance in a particular state. In this application, SBC does all three. Its Missouri application contains interconnection terms and conditions from Texas, and rates from both Texas and Missouri. The Arkansas application includes Texas and Kansas terms and conditions, rates incorporated *in toto* from Kansas, and some performance data from Texas. In fact, SBC took the "application by incorporation and reference" approach to such an extreme that it urged the Arkansas Public Service Commission ("AR PSC") not to conduct an in-depth review of its Arkansas 271 Interconnection Agreement ("A2A") or its checklist compliance in Arkansas. Instead the AR PSC was urged to rely on the findings of the Texas 271 proceeding.[7]

As the Commenters have already demonstrated in the initial proceeding on the Missouri application in CC Docket No. 01-88, and will demonstrate further below, SBC attempts to band-aid deficiencies in its applications by invoking rates and performance from other states. The Arkansas and Missouri Public Service Commissions gave SBC broad discretion to rely on performance and rates from other states despite serious reservations about SBC's application. The two commissions failed to look beyond the mega-interconnection agreements and foreign rates and data to determine if viable competition had actually taken root in their states.

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[4] *Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, FCC 01-29, (Jan. 22, 2001) ¶ 35 ("*SWBT KS/OK 271 Order*").

[5] *See Id.* at ¶ 82, n. 244.

[6] *See Id.* at ¶¶ 35-38.

[7] *In the Matter of the Application of the Southwestern Bell Telephone Company for Authorization to Provide In-Region, InterLATA Services Pursuant to Section 271 of the Telecommunications Act of 1996 and For Approval of the Arkansas Interconnection Agreement*, Arkansas PSC Docket No. 00-211-U, Consultation Report of the Arkansas Public Service Commission to the Federal Communications Commission Pursuant to 47 U.S.C. Section 271(D)(2)(B) at 9 (Dec. 21, 2000) ("*First AR PSC Consultation Report*").

The Commenters are concerned that these applications could set a dangerous precedent whereby applications may be found to be in technical compliance with checklist requirements, as they were by the Missouri and Arkansas PSCs, while not demonstrating the advent, much less the continued vitality, of competition in a particular state. The drafters of the Act, and this Commission, were wise to anticipate such a scenario by inserting a public interest standard as a separate and potent criterion that would ensure that the grant of Section 271 authority is truly in the public interest. The Missouri PSC did not engage in any substantial public interest analysis, merely treating checklist compliance as a surrogate for the public interest standard. The Arkansas PSC did not engage in any public interest analysis at all. The Commenters urge the Commission to breathe new life into the public interest standard and reestablish it as a viable substantive requirement that all applications must meet.

### B. Initial Conceptualization of the Standard

Section 271(d)(3)(C) of the Act directs that the Commission shall not give Section 271 authorization unless the requested authorization is consistent with the "public interest, convenience and necessity."[8] This public interest standard was intended to mirror the broad public interest authority the Commission had been given in other areas.[9] The legislative history of the 1996 Act evidences an unequivocal intent on the part of Congress that the Commission "in evaluating section 271 applications . . . perform its traditionally broad public interest analysis of whether a proposed action or authorization would further the purposes of the Communications Act."[10] As a Senate Report noted, the public interest standard is "the bedrock of the 1934 Act,

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[8] 47 U.S.C. § 271(d)(3)(C).

[9] *See* 47 U.S.C. § 241(a); § 303; § 309(a); § 310(d).

[10] *In the Matter of the Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298, ¶ 385 (1997) ("*Ameritech Michigan 271 Order*").

and the Committee does not change that underlying premise through the amendments contained in the bill."[11] The Report went on to add that "in order to prevent abuse of [the public interest standard], the Committee has required the application of greater scrutiny to the FCC's decision to invoke that standard as a basis for approving or denying an application by a Bell operating company to provide interLATA services."[12]

The Commission recognized the huge import that Congress placed on the public interest standard by crafting a strong definition of the standard in the Section 271 context. The Commission noted that under the standard it was given "broad discretion to identify and weigh all relevant factors in determining whether BOC entry into a particular in-region market is consistent with the public interest."[13] The Commission determined that as part of this broad authority it should consider factors relevant to the achievement of the goals and objectives of the 1996 Act.[14] The Commission explicitly recognized that "Congress did not repeal the MFJ in order to allow checklist compliance alone to be sufficient to obtain in-region, interLATA authority."[15]

Predictably, the RBOCs initially attempted to dilute the public interest standard. For instance, BellSouth argued that the public interest requirement is met whenever a BOC has implemented the competitive checklist.[16] BellSouth also contended that the Commission's responsibility to evaluate public interest concerns is limited narrowly to assessing whether BOC

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11 *Id.* at n. 992, *quoting,* S. Rep. Mo. 23, 104th Cong., 1st Sess. 44 (1995).

12 *Id.*

13 *Ameritech Michigan 271 Order* at ¶ 383.

14 *Id.* at ¶ 385.

15 *Id.*

16 *In the Matter of the Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana,* CC Docket No. 98-121, Memorandum Opinion and Order, FCC 98-271, ¶ 361 (1998).

entry would enhance competition in the long distance market.[17] The Commission rejected both of these claims and reaffirmed that it will consider "whether approval of a section 271 application will foster competition in all relevant telecommunications markets (including the relevant local exchange market), rather than just the in-region, interLATA market."[18] The Commission stated that it would not be satisfied that the public interest standard has been met unless there is an adequate factual record that the "BOC has undertaken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition."[19] As the Department of Justice notes, in-region, interLATA entry by a Bell Operating Company ("BOC") should be permitted only when the local markets in a state have been "fully and irreversibly" opened to competition.[20]

The importance of the public interest standard was recently reaffirmed by Senators Burns, Hollings, Inouye, and Stevens in a letter to Chairman Powell.[21] In that letter the Senators stated:

> [t]he public interest requirements were added to Section 271 to ensure that long distance authority would not be granted to a Bell company unless the commission affirmatively finds it is in the public interest. Meaningful exercise of that authority is needed in light of the current precarious state of the competitive carriers which is largely due to their inability to obtain affordable, timely, and consistent access to the Bell networks.[22]

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[17] *Id.*

[18] *Id.* Congress rejected an amendment that would have stipulated that full implementation of the checklist satisfies the public interest criterion. *Ameritech Michigan 271 Order* at ¶ 389.

[19] *Ameritech Michigan 271 Order* at ¶ 386.

[20] *In the Matter of Application of Verizon Pennsylvania, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania,* CC Docket No. 01-138, Evaluation of the United States Department of Justice at 2 (July 26, 2001); *see also, Ameritech Michigan 271 Order* at ¶ 382.

[21] Letter from Senators Conrad Burns, Ernest F. Hollings, Daniel K. Inouye, Ted Stevens to The Honorable Michael K. Powell, Chairman, Federal Communications Commission (April 17, 2001) ("*Senators' Letter*").

[22] *Id.* at 3.

### C. The Dilution of the Standard

Despite the strong Commission pronouncements on the public interest standard, the standard is increasingly becoming what the Commission has repeatedly held it should not be, *i.e.,* a mirror of the competitive checklist and a gauge of the long distance market. This is most definitely evidenced in the current applications. In its application SBC essentially rests its case that the Section 271 grants would be in the public interest on its purported compliance with the competitive checklist and the benefits of its entry into the in-region, interLATA market.[23] The Missouri Public Service Commission limited its public interest consideration to three pages and focused solely on the alleged benefits of SBC's entry into the Missouri long distance market and SBC's willingness to participate in the Performance Assurance Plan.[24] The Arkansas Public Service Commission declined to conduct any public interest analysis at all.[25]

These two applications provide a very telling demonstration of why it is not sufficient to rely on mere checklist considerations, and why a strong public interest standard is needed. PacWest noted in its Reply Comments in regard to Missouri how precarious the state of competition was in Missouri.[26] The Commenters noted in their initial comments how SBC's pricing, OSS and anticompetitive practices impeded the development of competition in the state.[27] In fact, because of the bleak prospects for competition in the Arkansas and Missouri

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[23] SBC Application at pp. 145-156.

[24] CC Docket No. 01-88, Written Consultation of the Missouri Public Service Commission at 86-89 (April 18, 2001)

[25] SBC Application at p. 144, n. 99.

[26] *PacWest Reply Comments* at p. 10.

[27] *See, generally, El Paso/PacWest Comments*.

markets, CLECs such as Commenters have been unable to enter the market and many are exiting the markets in those states.[28]

The Missouri PSC staff lamented that it is disappointed over the lack of residential customers being served over unbundled network elements, and that the level of local competition occurring in Missouri is disappointing.[29] The Missouri PSC was poised to not endorse SBC's application a couple of months before it was initially filed with the FCC because SBC was still not in compliance with four of the checklist items.[30] All SBC had to do, however, was make some modifications to its Missouri 271 Interconnection Agreement and it was found to be in compliance with the checklist.

The situation in Arkansas is not much better. The AR PSC itself described the "limited amount of competition which currently exists in Arkansas."[31] CLECs serve only 7% of the access lines in Arkansas.[32] The two largest facility-based providers of residential service have both indicated that they are withdrawing from the residential market due to high UNE rates.[33] Based on their withdrawal from the residential market, the AR PSC found "the record does not demonstrate that there are currently facilities-based CLECs to provide service to new residential customers and there is no evidence that any CLEC will offer service to the residential market

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[28] In Arkansas, AT&T observed that many of the companies SBC identified as competitors in the Arkansas market are no longer in the market. AR PSC Docket No. 00-211-U, Comments of AT&T Communications of the Southwest, Inc. (Redacted Version) at 2 (April 12, 2001) ("*AT&T AR Comments*").

[29] MO PSC Case No. TO-99-227, Staff's Response Comments to October Question and Answer Session and to Interim Consultant Report at 7 (October 26, 2000); Affidavit of William L. Voight at ¶ 24 (October 26, 2000).

[30] *PacWest Reply Comments* at 11.

[31] AR PSC Docket No. 00-211-U, Second Consultation Report of the Arkansas Public Service Commission to the Federal Communications Commission Pursuant to 47 U.S.C. Section 271(D)(2)(B) at 9 (May 21, 2000) ("*Second AR PSC Consultation Report*").

[32] *First AR PSC Consultation Report* at 5.

[33] *First AR PSC Consultation Report* at 5; *Second AR PSC Consultation Report* at 4

under the newly-proposed A2A rates."[34] The residential market is not the only market experiencing problems. SBC itself characterizes the advanced services market in Arkansas as "embryonic" as only 27 xDSL loop orders were placed in the last three months.[35]

Thus, when determining whether there was checklist compliance, neither the Arkansas PSC nor the Missouri PSC were making a determination that viable local competition actually existed in their respective states. Instead the Commissions were placing their hopes on the A2A and M2A to promote competition.[36] As the Missouri Office of Public Counsel noted "the actual finding that SWBT operates and continues to operate under the Section 271 compliant M2A was not made and in fact could not have been made."[37] After approving the M2A, the next step for the Missouri PSC should have been to "see the agreement in place under operational conditions for a sufficient period of time prior to the PSC voting on final approval."[38] Under such a monitoring period, "performance, not promises would become the focus of the evaluation to determine whether SWBT had indeed opened up its local market irrevocably to competition."[39] El Paso was recently informed that the availability of the M2A is contingent on SBC getting Section 271 approval in Missouri. Thus, it is at best a conditional promise on the part of SBC to create what it deems to be a competitive market in Missouri, and not a reflection on any actual competition. SBC is clearly attempting to invert the Section 271 process to be effectively stating that it will start the path to a competitive local market after it obtains long distance entry.

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[34] *Second AR PSC Consultation Report* at 12.

[35] SBC Application at 115.

[36] *See Second AR PSC Consultation Report* at 12.

[37] CC Docket No. 01-88, Comments of the Missouri Office of the Public Counsel at 11 (May 3, 2001) ("*MO Public Counsel Comments*").

[38] *Id.*

[39] *Id.*

It appears that no independent review was done by either Commission to determine if the A2A and M2A would promote competition in their particular states. In fact, SBC urged the AR PSC to forego such an independent review. As the AR PSC noted:

> SWBT places a great deal of emphasis on the proceeding before the Texas PUC and the Texas PUC's approval of the T2A in its Application requesting Commission review of the proposed § 271 filing. SWBT appears to take the position that the Texas PUC's proceeding was so detailed a review of SWBT's T2A and other operations as to eliminate any need to conduct an in-depth review of the A2A or checklist compliance in Arkansas. In addition, SWBT argues that the FCC Texas Order is crucial to the evaluation of its Arkansas 271 Application, contending that in that order, the FCC makes "it clear that SWBT's efforts to open its local markets to competition in Arkansas and across its five-state region meets, and in many cases, exceeds the requirements of § 271.[40]

Thus, clearly SBC was attempting to bootstrap its Arkansas application from its Texas 271 grant. The AR PSC astutely saw through this and rejected this regional approach in its *First Consultation Report.*[41] SBC's response was to modify its A2A to mirror its Kansas 271 Agreement. This was sufficient for the AR PSC to find SBC's application in compliance with the checklist.

The "regional" approach to SBC's application is not limited to the incorporation of interconnection agreement terms and conditions from other states. For instance, because the market for advanced services is "embryonic" in Arkansas, SBC relies on its performance in Texas to demonstrate compliance on this vital checklist item.[42] The Commission has condoned the use of performance data in states with more extensive commercial usage where data in a particular state is scarce, so SBC was merely utilizing a Commission-crafted short cut to show

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[40] *First AR PSC Consultation Report* at 9.

[41] *Id.*

[42] SBC Application at pp. 115-116. Throughout its reporting of Arkansas performance data pertaining to advanced services, SBC also provides its Texas data because for many metrics the performance sample is too small. *See Dysart AR Affidavit* at ¶¶ 52-104. For its line sharing performance, SBC relies almost exclusively on its Texas performance. *Id.* at ¶ 58.

checklist compliance.[43] The problematic and unanswered questions are: why is the advanced services market "embryonic" in Arkansas; why are carriers pulling out of the residential market in Arkansas, and why is there a lack of UNE-based and residential competition in Missouri?

For instance, AT&T notes that SBC's non-compliant line sharing terms, difficulty in gaining access to SBC's Project Pronto architecture, and SBC's poor provisioning of x-DSL, DS 1, and BRI loops have impeded development of a competitive DSL market in Arkansas.[44] Likewise in Missouri, there are few orders for conditioned loops and line shared loops; SBC was failing to provide line shared loops in a timely manner; and DS 1 loops were not provisioned in a timely manner.[45] El Paso asked that SBC implement metrics to track DS-3 and dark fiber provisioning, but SBC has refused to do so. As a result, significant failures in provisioning of these UNEs fail to show up in the performance data. SBC clearly hopes to mask the root cause of the stunted local markets in its region which is its own practices.

Issues pertaining to the state of current competition in Missouri and Arkansas are not being considered in the context of checklist evaluations as SBC seizes upon short-cuts such as mega-interconnection agreements and incorporation of rates and data from other states to truncate checklist review. This is why an independent and viable public interest standard is so important. For instance, under such an analysis, the Commission has noted that it would examine data on "the nature and extent of actual local competition" and if there is a lack of commercial entry whether the BOC is a cause of the problem.[46]

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[43] *SBC KS/OK 271 Order* at ¶¶ 35-36.

[44] *See AT&T AR Comments* at 12-15; 36-37.

[45] *See Dysart MO Affidavit* at ¶¶ 55-57, 104.

[46] *Ameritech Michigan 271 Order* at ¶ 391.

In Missouri, the Department of Justice noted that the effect of the high and largely interim rates is seen in the lack of UNE-based competition, and that the pricing issues were giving rise to doubts that the market is open to competition.[47] In Arkansas, the AR PSC noted that residential competition was limited and decreasing as opposed to increasing, but the AR PSC hoped lower A2A rates would spur competition.[48] It is clear that neither state commission was basing its finding of checklist compliance on the state of actual local competition but on the hope of the blossoming of future competition based on the M2A or A2A. SBC is asking the Commission to determine that these applications are minimally compliant with the competitive checklist based on the conditional rates, terms and conditions of the A2A and M2A and performance data incorporated from other states. If, however, the Commission remains true to the language of the statute, and its initial pronouncements on the public interest standard, it would not limit its inquiry in the manner in which SBC seeks. It would ask if the local markets in Arkansas and Missouri are irreversibly open to competition.[49]

### D. The Importance of the Public Interest Standard In Establishing Genuine Competition

A viable public interest standard will enable the Commission to look beyond technical checklist considerations and determine if competition has actually taken root in a particular state. The experiences of the Arkansas and Missouri state commissions demonstrate that one can find an application to be technically compliant with the checklist while still having reservations about the development of competition in the state. Without an independent public interest standard, a

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[47] *DoJ Evaluation* at 6, 19.

[48] *Second AR PSC Consultation Report* at p. 6.

[49] As Sprint noted in regard to Arkansas, "the promise of future competition has no place in this proceeding as SWBT's legal obligation is to establish that there is current competition." *Sprint AR Comments* at 4 (emphasis in original).

RBOC that has a history of limiting competition in a particular state can implement a mega-interconnection agreement incorporating rates and terms from other states, invoke performance data from other states, and allege checklist compliance without the development of actual, viable local competition in the state. An independent public interest standard would defeat such an approach and encourage future applicants to promote the development of true competition in the state.

In addition, a viable public interest standard will guard against the perils of a premature grant of Section 271 authority. If an RBOC is allowed into the long distance arena before a local market is irreversibly open, local competition will not develop, and long distance competition could be imperiled.[50] As Dr. Cooper of the Consumer Federation of America noted:

> [t]he risk that arises from a rush to approve the 271 is that the incumbent can exploit the anticompetitive conditions, or 'competitive imbalance,' in the critical early days of the bundled telecommunications market. It can then rapidly capture long distance customers by bundling local and long distance service, while competitors are unable to respond with a competitively priced bundle. Allowing premature entry will cause the CLEC industry to shrink, as RBOCs capture long distance market share. The incentive to open the local market will be eliminated.[51]

As the Commission has also noted:

> Section 271, however embodies a congressional determination that, in order for this potential to become a reality, local telecommunications markets must first be open to competition so that a BOC cannot use its control over bottleneck local exchange facilities to undermine competition in the long distance market. Only

[50] *Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks, Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks, Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Services, Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Service,* California Public Utilities Commissions Docket Nos. R.93-04-003, I.93-04-002, R.95-04-043, I.95-04044, Comments of Dr. Mark N. Cooper for the Consumer Federation of America on Public Interest Issues at 16 (Aug. 23, 2001) ("*CFA CA Comments*").

[51] *Id.*

> then is the other congressional intention of creating an incentive or reward for opening the local exchange market met.[52]

While a BOC's entry into the long distance market may have pro-competitive effects, those benefits are only sustainable if the local telecommunications market remains open after BOC entry.[53] Thus, all the focus on the purported benefits of SBC entering the long distance markets in Arkansas and Missouri is putting the cart before the horse. The local market has to be truly open to competition for those benefits to take root.

The situation in Missouri is very illustrative of this point. In Missouri, there are currently a great deal of UNE rates that are subject to true-up pending resolution of outstanding Missouri PSC cost proceedings.[54] The history of UNE pricing in Missouri has shown high rates and deviations from TELRIC-principles.[55] If the permanent UNE rates follow this trend, the high rates coupled with SBC's dominance in the local market, will impede CLECs' ability to provide a competitively priced bundled product. This will stunt competition in both the local and long distance market.

The Commission must examine if local competition has truly developed in Arkansas and Missouri and is sustainable. If not competition in both the local and long distance markets are at risk. Two key conditions for competition are operating systems that treat competitors at parity and cost-based pricing for unbundled network elements.[56] Both conditions are lacking in Arkansas and Missouri.

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[52] *Ameritech Michigan 271 Order* at ¶ 388.

[53] *Id.* at ¶ 390.

[54] *See El Paso/PacWest Comments* at 10.

[55] *PacWest Reply Comments* at 8.

[56] CC Docket 01-88, Reply Comments of the Consumer Federation of America at 6 (May 16, 2001).

## II. PRICING IN MISSOURI AND ARKANSAS DOES NOT COMPLY WITH CHECKLIST ITEM 2 NOR DOES IT PROMOTE THE PUBLIC INTEREST

Checklist Item 2 of Section 271 states that a Bell Operating Company ("BOC") must provide "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1) of the Act."[57] Section 251(c)(3) requires LECs to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory . . . ."[58] Section 252(d)(1) mandates that state commissions should determine just and reasonable rates for network elements that are nondiscriminatory and based upon the cost of providing the network element.[59] The Federal Communications Commission ("FCC" or "Commission") has determined that prices for unbundled network elements (UNEs) must be based on the total element long run incremental cost ("TELRIC") of providing those elements.[60]

### A. Missouri

Concerns about cost-based pricing in Missouri were a large part of the reason SBC withdrew its initial application in June.[61] The only change in the pricing in SBC's new application is that SBC lowered some UNE-P related charges.[62] Since these reductions do little if anything to address the three problems identified by Commenters in their Comments and

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[57] 47 U.S.C. § 271(B)(ii).

[58] 47 U.S.C. § 251(c)(3).

[59] 47 U.S.C. § 252(d)(1). The State Commissions may factor in a reasonable profit when basing rates upon costs.

[60] *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks, Inc. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 01-9, Memorandum Opinion and Order, FCC 01-130, ¶ 16 (Apr. 16, 2001) ("*Verizon MA 271 Order*").

[61] Statement of FCC Chairman Michael Powell On Withdrawal of SBC 271 Application in Missouri, FCC Press Release (June 7, 2001).

[62] SBC Application at 47.

Reply Comments – high rates, nonconformance with TELRIC principles, and extensive use of interim prices – the Commenters will simply rely on their initial challenges raised, which are incorporated by reference, rather than rehash them. One point that the Commenters would like to emphasize is the fact that no matter how reasonable SBC may claim that its rates in the M2A are, many of these rates are subject to true-up pending the completion of pending cost proceedings before the Missouri Public Service Commission.[63] The prior history of rate-setting in Missouri provides no confidence that pro-competitive forward-looking rates will result from those proceedings. The high rates SWBT is seeking in those proceedings suggests that excessive rates will continue to exist in Missouri. As Commenters have urged before, the Commission should refrain from making any determination on checklist compliance until those proceedings are completed. The Department of Justice concluded that "the continued uncertainty of so many rates, coupled with the doubts about pricing discussed *supra*, gives rise to doubts that the market is open to competition by firms that seek to use these elements."[64] Nothing has transpired since June 2001 to alter this conclusion.

### B. **Arkansas**

Arkansas presents a very interesting situation in regard to pricing. Arkansas statutes limit the AR PSC from imposing any interconnection requirements that go beyond the requirements of the federal act or regulations promulgated under the federal act.[65] Except for basic exchange service and switched-access service, any company making an election under Ark. Code Ann. § 23-17-406 (alternative regulation), such as SWBT may increase or decrease its rates for

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[63] *El Paso/PacWest Comments* at p. 10.

[64] *DoJ MO Evaluation* at 19.

[65] Ark. Code Ann. § 23-17-408(i)(2) (Supp. 1999).

telecommunications services without Commission approval.[66] Because of these regulations, the AR PSC did not review any of SWBT's resale, unbundled network element, or interconnection rates.[67] The AR PSC noted that "after February 4, 1997, the Commission lost all jurisdiction and authority to review or investigate SWBT's rates and charges, including rates for new services such as UNEs and resale of services to CLECs."[68] In fact, CLECs filed petitions with the AR PSC to set cost-based collocation and loop conditioning rates.[69] The AR PSC dismissed the collocation petition, *inter alia*, because "SWBT's rates and tariffs for services that are defined as telecommunications services . . . are not subject to Commission review, investigation or approval, and are not subject to the Commission's complaint jurisdiction."[70] The AR PSC never ruled on the loop conditioning petition.[71]

As a result, SBC could tariff any rate it pleased for such services as collocation and loop conditioning. SBC's collocation rates in Arkansas were among the highest in the nation at the time of the filing of the petition.[72] Its loop conditioning rates were also exorbitant.[73] The rates that SBC initially included in its A2A for recurring and nonrecurring charges were substantially higher than the rates in the T2A.[74] The AR PSC had no authority to review these rates or

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66 Ark. Code Ann. § 23-17-408(c ) (Supp. 1999).

67 *See* SBC Application at 18.

68 *Re AT&T Communications of the Southwest, Inc.*, AR PSC Docket No. 96-395-U, Order No. 12 (1998).

69 *In the Matter of a Petition of Connect Communications Corp., DSLNet Communications, LLC, KMC Telecom III, Inc., and New Edge Network for an Order Requiring Southwestern Bell Telephone Company to File a Collocation Tariff,* AR PSC Docket No. 00-047-U, Petition (Feb. 22, 2000); *Petition of @Link Networks, Inc; DSLnet Communications, LLC; Blue Star Networks, Inc.; MGC Communications, Inc. d/b/a Mpower Communications Corp.; and Vectris Telecom, Inc.for an Order Requiring Southwestern Bell Telephone Company to File Just and Reasonable Loop Conditioning Rates*, AR PSC Docket No. 00-195-U, Petition (July 20, 2000).

70 AR PSC Docket No. 00-047-U, Order No. 4 at 4 (May 12, 2000).

71 The loop conditioning petition was recently withdrawn at the request of Staff of the AR PSC.

72 *Id.* at 1.

73 *Loop Conditioning Petition* at 7.

74 *First AR PSC Consultation Report* at 10.

mandate lower rates. Thus, SBC could not meet the requirements of Checklist Item 2 because it could not demonstrate that cost-based rates have been implemented in Arkansas.

SBC attempts to circumvent this problem by incorporating *in toto* the rates in its Kansas 271 Interconnection Agreement. Once again, SBC is seizing on a short cut provided by the Commission, *i.e.,* that an applicant would be entitled to a presumption of compliance with TELRIC if it adopted New York or Texas rates in whole and could demonstrate that its costs were at or above the costs in that state whose rates it adopted,[75] to come into purported compliance with the checklist. Of course, SBC glosses over the fact that it is adopting Kansas rates not Texas ones. As WorldCom notes:

> Texas UNE rates – recurring and nonrecurring – were examined by the Texas commission, versus the Oklahoma/Kansas UNE rates that were to some extent "set" (actually negotiated) when SWBT submitted its "bid" to the FCC, agreeing to lower by up to 25 percent the UNE rates it had originally submitted in order to secure 271 approval in Kansas and Oklahoma.[76]

The AR PSC actually requested that SBC incorporate its Texas rates,[77] but instead SBC incorporated its Kansas rates that are "substantially higher" than the Texas rates.[78] The Commission should also not place much value in initial rates proffered in these mega-interconnection agreements. The prices in SBC's multi-state agreement are significantly higher than prices in the T2A. For example, dark fiber interoffice (urban), dark fiber per strand, and dark fiber cross-connects are priced 107%, 100%, and 169%

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[75] *SBC KS/OK 271 Order* at ¶ 82 n. 244.

[76] AR PSC Docket No. 00-211-U, *Comments of WorldCom* at 3 (April 12, 2001) ("*WorldCom AR Comments*").

[77] *First AR PUC Consultation Report* at 12.

[78] AR PSC Docket No. 00-211-U, *Sprint Communications Company L.P.'s Initial Comments* at 5 (April 12, 2001) ("*Sprint AR Comments*"); *see also, AT&T AR Comments* at 10.

higher respectively in the generic agreement than in the T2A.[79] El Paso is very concerned that as a practical matter CLECs will be only offered higher generic rates in the future. Therefore, the Commission should accord little weight to SBC's "2A" prices in determining Section 271 compliance.

Moreover, consideration of whether conditional rates comply with the checklist is no indication of whether local competition has developed under existing pricing. CLECs in Arkansas have not been able to partake of cost-based rates at all until the implementation of the A2A. Granting SBC's application in Arkansas based on Kansas rates would take the "application by incorporation or reference" approach to a new extreme. It would allow for section 271 authority in which cost-based rates have never been implemented save for rates incorporated from another state. This is surely not a result that Congress would have intended, nor one that the Commission should desire.

The concern when rates are incorporated from other states is what happens when new services requiring pricing or pricing disputes arise in a particular state. The disinclination of the AR PSC to review the rates, even when SBC purports that the AR PSC has the authority to do so,[80] is cause for grave concern. This concern is exacerbated by the AR PSC's characterization of its "limited legal authority to ensure future performance."[81] Thus, even if the Commission finds the level of competition in Arkansas to be minimally adequate, there is no assurance that the market will remain open.

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[79] Dark Fiber IO (Urban) – T2A price is $0.0594 compared to a generic price of $0.0123. Dark Fiber per strand – T2A price of 0.00 compared to generic price of $22.82. Dark Fiber Cross-Connect – T2A price of 1.71 compared to generic price of $4.60.

[80] *SBC Application* at p. 18.

[81] *Second AR PSC Consultation Report* at 12.

Even if the Commission finds that the incorporation of rates from another state rectifies prior failures to implement cost-based rates in a state, the public interest standard still requires a consideration of what effect those rates had on the development of local competition in the state. ALLTEL was the main provider of residential service in the state of Arkansas.[82] It had 2,025 customers, nearly half (44%) of whom were their own employees.[83] Later, ALLTEL announced it was pulling out of the residential market because of high UNE rates.[84] Navigator, the other major facilities based provider of residential service also pulled out of the residential market because it "found that SWBT's assessment of unexpected, inapplicable, and even hidden non-recurring charges – associated with UNE provisioning – has rendered the provisioning of UNE-P service in Arkansas economically unfeasible for Navigator."[85] Likewise it does not require a stretch in reasoning to surmise that high collocation and loop conditioning rates have contributed to the "embryonic" state of the advanced services market. It is clear that high prices have impeded the development of local competition in the state of Arkansas, and the AR PSC's request that SBC apply Texas rates in Arkansas lends credence to this fact.[86]

## III. SBC's CONTINUING OSS PROBLEMS FAIL TO SATISFY CHECKLIST ITEM 2

### A. Legal Standard

Checklist Item 2 requires that a BOC provide non-discriminatory access to network elements.[87] In analyzing whether a BOC provides non-discriminatory access to OSS for Section

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82 *First AR PSC Consultation Report* at 5.

83 *Id.*

84 *Id.* at 10-11.

85 *Second AR PSC Consultation Report* at 4.

86 *See First AR PSC Consultation Report* at 10-12.

87 47 U.S.C. § 271(c)(2)(B)(ii).

271 purposes, the Commission has adopted a two-step approach. First, the Commission determines "whether the BOC has deployed the necessary systems and personnel to provide sufficient access to each of the necessary OSS functions and whether the BOC is adequately assisting competing carriers to understand how to implement and use all of the OSS functions available to them."[88] The Commission has traditionally focused on the functionality and capacity of the BOC's OSS in its analysis of this step.

In the second step, the Commission determines if "the OSS functions that the BOC has deployed are operationally ready, as a practical matter."[89] It looks at performance measures and other evidence of commercial readiness. The Commission evaluates performance in the five stages of OSS – pre-ordering, ordering, provisioning, maintenance/repair and billing.

**B. Missouri**

The Commission requires that a 271 applicant demonstrate that its OSS is designed to accommodate both current and projected demand for competing carriers' access to OSS functions.[90] The Commenters noted in their initial Comments that there are serious concerns about the functionality and capacity of SWBT Missouri's OSS systems.[91] A useful indicator of the overall performance of OSS is the "success ratio." A success ratio represents the ratio of "met" PMs to PMs with a z-score and sample size of 10 or more. A PM is "missed" if it has a z-

[88] *Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, FCC 00-238 at ¶ 96 (June 30, 2000) ("*SBC TX 271Order*")

[89] *Id.*

[90] *Id.* at ¶ 97.

[91] *El Paso/PacWest Comments* at 15.

score of 1.68 or higher.[92] SWBT's success ratios for Missouri were generally the lowest among the five SWBT states.[93] In regard to three-month period before SBC's first Missouri application, SBC had only 89.6% a success rate for the OSS measures.[94] In the most recent three month period, the "success" figure has actually dropped slightly to 89.5%.[95] This means that SBC has not achieved parity or the applicable benchmark for over 10% of the OSS measures in at least two of the last three months. This does not provide the type of sustained compliance with performance benchmarks required by the 271 checklist. The Commission should carefully scrutinize performance data to ensure that all outstanding OSS issues have been resolved and SWBT has demonstrated compliance with applicable benchmarks for a sustained period.

In their initial Comments, Commenters also expressed concerns about SBC's flow-through rates.[96] This Commission has previously focused on "flow-through" rates as an indication of parity in the ordering stage.[97] "Flow-through" refers to orders that are transmitted electronically through the gateway and accepted into the ILEC's back office ordering systems without manual intervention. The flow-through rate often "serves as a yardstick to evaluate whether an incumbent LEC's OSS is capable of handling reasonably foreseeable commercial volumes of orders."

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[92] MO PSC Case No. TO-99-297, Staff's Response to the Second Question and Answer Session, and to Presentation of Ernst & Young at 11 (Nov. 30, 2000) ("*Staff's November Comments"*)

[93] *El Paso/PacWest Comments* at 15.

[94] *Id., citing,* CC Docket 01-88, Affidavit of William R. Dysart at ¶ 46.

[95] CC Docket 01-194, SBC Application, Affidavit of William R. Dysart for Missouri at ¶ 32 (August 20, 2001) ("*Dysart MO Affidavit*").

[96] *El Paso/PacWest Comments* at 16.

[97] *BANY* Order at ¶ 160, fn. 488, ¶ 162, fn. 496.

There continues to a disparity in flow-through rates between SWBT's retail operations and CLECs for orders submitted through SWBT's LEX interface.[98] LEX is an electronic graphical user interface that provides an option for CLECs that wish to utilize national guideline ordering formats but do not have EDI capability. LEX supports the same activity types of orders as SWBT's EDI gateway for resale services and UNEs. In February 2001, over 174,900 service orders were originated via LEX.[99]

SWBT has failed to achieve parity for PM 13-02 (Order Process Percent Flow Through – LEX) since September 2000.[100] During the past four months, the flow through rate for the LEX interface was nearly 4% lower than SBC's retail flow through rate.[101] The overall flow-through rate for all the OSS interfaces combined is out of parity as well.[102] The Texas PUC asked SBC to restate its data for its flow through metric to reflect UNE-P orders. Since the performance metrics are based on the Texas PUC metrics, SBC restated its Missouri data for this metric to reflect UNE-P orders. When UNE-P orders were factored in, the flow through rate was even worse. In one month the rate dropped to 68%.[103] This meant that nearly a third of the orders using this interface required manual processing. CLECs are finding a lot more manual processing of orders using this interface than they would expect or desire.[104] This manual

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[98] *See, Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region, InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996*, Missouri PSC Case No. TO-99-227, Order Regarding Recommendation on 271 Application Pursuant to the Telecommunications Act of 1996 and Approving the Missouri Interconnection Agreement, p. 43 (Mar. 15, 2001) ("*MO PSC 271 Order*").

[99] CC Docket No. 01-88, Affidavit of Elizabeth Ham at ¶ 130.

[100] *Dysart MO Affidavit* at ¶ 46.

[101] *Id.*

[102] *Id.*

[103] *Id.,* Table 1, p. 28.

[104] MO PSC Case No. TO-99-297, Transcript of October 11, 2000 Hearing at 2349 (Oct. 11, 2000) ("10/11 Tr.").

processing is problematic in that it will increase the time in processing orders, and given the concerns about scalability of SWBT's OSS, the problem may be exacerbated with increasing commercial volumes of orders.

The Commenters, in their initial Comments, raised concerns regarding a flaw in one of SWBT's systems that may be distorting SWBT's performance data region wide in regard to maintenance and repair.[105] CLECs had discovered a flaw in one of SWBT's legacy systems, LMOS, that results in SWBT not reporting data or reporting data inaccurately for most, if not all, of their Maintenance and Repair Performance Metrics. Since this system is used region-wide, any reporting errors would affect Arkansas and Missouri data.

SBC admits that due to problems in its LMOS database, more than 9% of working UNE-P lines were incorrectly listed as "disconnected" in the LMOS database.[106] Thus, when a CLEC attempted to electronically open a trouble ticket on those lines it could not do so because the database listed the line as disconnected.[107] In addition, because trouble tickets are identified, for performance measurement purposes, using information from the LMOS database, the performance reporting systems may misidentify the sender of the manual trouble ticket as the last owner of the line, which in most cases will probably be SBC.[108] This greatly undermines the accuracy of the reports. SBC also notes that the percentage of lines misidentified in the LMOS database was higher in Missouri and Arkansas than in other states in the SBC region.[109] SBC admits that it has not eradicated all instances of misidentified lines and that even with fixes it has

[105] *El Paso/PacWest Comments* at 18-20.

[106] SBC Application at 65.

[107] *Id.*

[108] *Id.*

[109] *Id.* at 66, n. 54.

implemented the problem could still arise in the future.[110] Given the extent and gravity of the problem, the Commission should carefully review SBC's performance in regard to maintenance OSS performance before determining checklist compliance.

C. **Arkansas**

SBC's OSS in Arkansas is also exhibiting similar problems in regard to flow through. SBC has not met the standards for parity performance for PM 13-02 (Order Process Flow Through – LEX) since September 2000.[111] This is particularly problematic because the LEX interface carries the majority of the electronic orders in Arkansas.[112] AT&T also noted in the Arkansas proceeding how SBC had implemented Performance Metric 13 in a "manner that overstates the rate at which UNE-P orders flow through its systems without falling out for manual handling, while understating the flow through rate for its own retail orders that is used as a parity standard."[113] Once the Texas PUC required SBC to correct its misimplementation of PM 13, the data reflected significant decreases in the flow through rate in Arkansas, with some months showing up to a 20% decline in flow through performance in comparison to SBC's previously reported data.[114]

AT&T has also noted the impact of the LMOS database problems on the performance data in Arkansas. AT&T noted that "the impact of the failure to update the LMOS records from a performance measurement standpoint would be to understate a CLEC's trouble report rate and

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[110] *Id.* at 66, 69.

[111] CC Docket 01-194, Affidavit of William Dysart for Arkansas at ¶ 48 (August 20, 2001) ("*Dysart AR Affidavit*").

[112] *AT&T AR Comments* at 32.

[113] *Id.* at 29.

[114] *Dysart AR Affidavit*, Table 1, p. 27

potentially to overstate the SWBT retail rate used for parity comparison."[115] AT&T also observed how SBC had acknowledged that it had understated its missed due date rate for certain CLEC orders, and had reported erroneous data in related POTS provisioning measures, by "misapplying an exclusion for CLEC-caused missed due date transactions where SWBT actually was at fault."[116]

The concerns about OSS performance are heightened in Arkansas because the AR PSC believed it was "not necessary" for it to conduct an independent review of SWBT's performance data.[117] Thus, unlike other proceedings where the Commission could rely on the state commission's careful scrutiny of performance data to allay any concerns, no such comfort is provided here. In addition, on a going-forward basis, the AR PSC's own concerns about its limited enforcement authority do not provide much security for the future.

## IV. RESTRICTIONS ON THE RESALE OF ADVANCED SERVICES DO NOT COMPLY WITH CHECKLIST ITEM 14 NOR DO THEY PROMOTE THE PUBLIC INTEREST

In its evaluation of SBC's initial Missouri application, the Department of Justice noted that there are "serious concerns pertaining to SBC's resale of advanced services, namely whether SBC is offering DSL services to end users without making those services available for resale at a wholesale discount."[118] The Department of Justice noted that if true, this refusal would raise issues in regard to SBC's compliance with section 251(c)(4) of the Act and *Association of Communications Enterprises v. FCC*.[119]

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[115] *AT&T AR Comments* at 33-34.

[116] *Id.* at 35.

[117] *First AR PSC Consultation Report* at 24.

[118] *DoJ MO Evaluation* at May 9, 2001.

[119] *Id., citing,* 235 F.3d 662 (D.C. Cir. 2001) (An ILEC may not avoid obligations pursuant to Section 251(c) with respect to advanced services by providing them through a subsidiary).

SBC concedes that it offers two DSL products that it does not permit CLECs to resell. One is a DSL transport product that it claims is merely an input component that it sells to ISPs on a wholesale basis and therefore is not a retail telecommunications service subject to resale obligations.[120] AT&T noted, however, that SBC was marketing this product on its website directly to residential and business end users. The end user could purchase this product directly from SBC. The end user could purchase either a combined DSL transport/internet access product directly from ASI, SBC's advanced services affiliate, or choose one of SBC's ISP partners to provide the ISP portion of the service.[121] SBC admits that it used to bill directly some end users for this DSL transport service.[122] SBC claims now the product is offered exclusively to ISPs, so now it is a "wholesale" product.

The second product is a high-speed DSL internet access service that end users can purchase from SBC affiliate, Southwestern Bell Internet Services ("SBIS"). SBC admits that this product is a retail product but claims that since this product combines an information service (internet access) with a telecommunications service (DSL transport) it is a "retail information service" that does not need to be resold.[123] With both these products it appears that SBC is playing word and shell games to avoid its resale obligations.

This Commission has unequivocally stated that an applicant is required to show that its affiliates provide DSL and advanced services in accordance with the decision in *ASCENT.*[124] It is undisputed that an affiliate of SBC is providing DSL service on a retail basis to end users.

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[120] SBC Application at 54.

[121] CC Docket No. 01-88, Reply Comments of AT&T at 28 (May 2001) ("*AT&T MO Reply Comments*").

[122] SBC Application at 57.

[123] SBC Application at 59.

SBC's machinations are similar to those used by Verizon in Connecticut to avoid its Section 251(c) resale obligations. Verizon claimed it was not required to resell DSL service where other carriers are providing voice service over the line. As the Commission made clear, "the *ASCENT* decision made clear that Verizon's resale obligations extend to VADI regardless of whether it continues to exist as a separate entity or whether it is integrated into Verizon, and regardless of the way Verizon structures VADI's access to the high frequency portion of the loop."[125] Likewise here, the Commission should make clear that regardless of the way SBC defines its DSL product or structures the delivery of the product to the end user it cannot evade the requirements of Section 251(c)(4) and *ASCENT.*

As the Commission noted policies that prevent competitive resellers from providing both voice and DSL service to their customers while the incumbent can provide such a combined product is clearly contrary to the "pro-competivie Congressional intent underlying section 251(c )(4)" because it "severely hinders the ability of other carriers to compete."[126] SBC's evasive actions also severely undercut the public interest by stunting the development of competition in the advanced services market. As noted above, the advanced services market in Arkansas is embryonic. As the Department of Justice noted, DSL entry in Missouri is "modest" as there are only 4,500 CLEC DSL lines in Missouri.[127] Meanwhile, SBC has more than one million DSL lines in service region-wide, and is added nearly 170,000 DSL lines in the last quarter.[128] Clearly its joint marketing efforts with SBIS are providing to be very effective, and once it can

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[124] *Application of Verizon New York, Inc., et al., for Authorization to Provide In-region, InterLATA Services in Connecticut*, CC Docket No. 01-100, Memorandum Opinion and Order, FCC 01-208, ¶ 27 (July 20, 2001) ("*Verizon Connecticut 271 Order*").

[125] *Id.* at ¶ 32.

[126] *Id.*

[127] *DoJ MO Evaluation* at 6.

offer long distance service into its bundled offering, the disparity in the advanced services market is likely to grow. Allowing SBC to restrict opportunities to resell its DSL service is not in the public interest.

## V. CONCLUSION

For the foregoing reasons, El Paso Networks, LLC and PacWest Telecom, Inc. urge the Commission to deny SBC's Application for Provision of In-Region InterLATA Services in Arkansas and Missouri.

Respectfully submitted,

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[128] *SBC Announces Second Quarter Earnings,* SBC Press Release (July 25, 2001).